IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-209

COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, A CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Petitioner*

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

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Common Carrier Conference—Irregular Route, a Conference of the American Trucking Associations, Inc., petitioner below, and Steel Carriers Conference of A.T.A., also a Conference of the American Trucking Associations, Inc., intervenor in support of petitioner below, both sometimes collectively referred to herein as "petitioners," pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the court of appeals entered April 23, 1976 (Appendix (App.) A, *infra*) is reported at ——U.S. App. D.C. ——, 534 F.2d 981. Its orders denying petitioners' Petition for Rehearing or in the Alternative Suggestion of Rehearing En Banc (App. B, pp. 6a, 8a), were entered on May 17, 1976.

Attached to this petition as Appendix C are copies of the following orders of the Interstate Commerce Commission (Commission) served in Ex Parte No. MC-55 (Sub-No. 8), *Motor Common Carriers of Property, Routes and Services (Petition for Elimination of Gateways by Rulemaking)*: (a) order served December 5, 1974, denying petitioner's petition seeking rule modification; (b) Policy Statement Concerning Ex Parte No. 55 (Sub-No. 8) and Applications Under Sections 5(2) and 212(b) of the Interstate Commerce Act (act) served December 4, 1974; and (c) order served April 1, 1975, denying petitioner's petition for reconsideration.

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 1976. Petitioners' timely petition for rehearing with suggestion of rehearing en banc was denied by orders entered on May 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether in a rulemaking proceeding, the Commission exceeded its statutory authority in imposing a "public convenience and necessity" requirement of



Sec. 207 of the act, 49 U.S.C. Sec. 307, in irregular route motor carrier transactions governed by (a) Sec. 5 (49 U.S.C. Sec. 5) which by its terms limits the standard to consistency with the "public interest," and (b) Sec. 212(b) of the act (49 U.S.C. Sec. 312), enacted by Congress to permit small motor carriers to combine operations "without going through a great deal of red tape with the Commission."

2. Whether the Commission's orders complained of are invalid because of its failure to comply with the Fededal Register notice requirements of Sec. 553 of the Administrative Procedure Act (APA, 5 U.S.C. Sec. 553).

## STATUTES INVOLVED

The relevant portions of the following statutes are involved and are reproduced in Appendix D: Secs. 5(2)(a)-(c), 5(11), Secs. 207 and 212(b) of the act (49 U.S.C. Secs. 5(2)(a)-(c), 5(11), 307 and 312(b)); and Sec. 553 of the Administrative Procedure Act (5 U.S.C. Sec. 553).

## STATEMENT

Motor common carriers subject to the regulation of the Commission are generally divided into two classes: those which are certificated to operate over regular routes, i.e., over designated highways between fixed termini, and those operating over irregular routes, i.e., over the most direct routes available between the points and territories authorized to be served.[1] There are lit-

[1] E.g. Between New York, N.Y., and Washington, D.C. From New York, N.Y., over the New Jersey Turnpike to junction Interstate Highway 95, thence over I95 to Washington, D.C., and return over the same route, in the case of a regular route carrier, or in the case of an irregular route carrier: Between New York, N.Y., and Washington, D.C.

erally thousands of regulated motor carriers operating throughout the country under irregular route certificates of public convenience and necessity.

When a regular route carrier seeks to acquire adjacent operating authority of another carrier and their combined annual gross revenues exceed $300,000, their only burden in obtaining Commission approval of the acquisition and conducting through, unified operations is to demonstrate that the transaction is consistent with the public interest pursuant to the provisions of Sec. 5 of the act. Thus, a regular route carrier (as exemplified in footnote 1) may acquire an adjacent certificate between Washington, D.C., and Richmond, Va., and thereafter provide service between New York, N.Y. and Richmond, Va., upon a showing only of consistency with the public interest. On the other hand, under the orders complained of, if the irregular route carrier in question seeks to acquire an irregular route certificate between Washington, D.C., and Richmond, Va., and thereafter operate between New York, N.Y., and Richmond, Va., it must show: (1) that the transaction is consistent with the public interest pursuant to Sec. 5, *and* (2) that the public convenience and necessity requirements of Sec. 207 of the act require the acquiring carrier's service between New York, N.Y., and Richmond, Va.[2] This extraordinary burden on irregular route carriers, asserted by petitioners to be in excess of the Commission's statutory authority, came

[2] In the event the combined annual gross revenues of the carriers involved in the transaction is less than $300,000, the application would be processed under less complicated procedures afforded under Sec. 212(b) of the act and the Commission's Transfer Regulations, 49 C.F.R. 1132. But even there, the additional burden of proving public convenience and necessity for the unified service of the small acquiring carrier is now required.



about in the proceedings complained of and was sustained by the court below.

In Ex Parte No. 55 (Sub-No. 8), the Commission in a rulemaking proceeding designed to provide some relief from the fuel shortage by eliminating circuitous operations via "gateways"[3] by irregular route carriers, proposed regulations which, subject to their terms, would permit irregular route carriers presently operating via gateways through tacking irregular route certificates, to operate directly between any two points authorized to be served, without the necessity of operating through the gateways.

While Federal Register notice was given of the Commission's intention to promulgate regulations dealing generally with the subject of elimination of gateways, such notice contained proposed rules referring to "carrier" in the singular and never in the plural. No mention whatsoever was made in the Federal Register notice of the Commission's intention to make its regulations in any way applicable to acquisition proceedings under either Sec. 5 or Sec. 212 of the act. The proposed regulations published dealt with gateway elimination procedures where a single carrier held two or more operating certificates which were tackable. Had the notice embraced acquisitions, it would have been essential that the term "carriers" in the plural be used. The only allusion to the Commission's intention of making its regulations applicable to acquisitions and transfers appeared in an obscure footnote not published in the

[3] In the example in note 1, *supra*, the separate certificates would authorize service at the common point of Washington, D.C., referred to as a "gateway" or "point of joinder," where the separate certificates would be "tacked" or "joined."

Federal Register but found only in its printed decision in 119 M.C.C. 170 (served November 23, 1973). Such decisions are not normally read by the small members of the industry as is the Federal Register. Indeed, of the thousands of irregular route motor carriers affected by the orders complained of, only a handful became aware of the Commission's intention, filed comments and provided input *prior* to the promulgation of the regulations on February 25, 1974.

On that date, the Commission served its definitive decision in the rulemaking proceeding (119 M.C.C. 530), where for the first time it articulated what it had in mind with respect to the application of the regulations to acquisitions by irregular route carriers. The regulations (codified at 49 C.F.R. Sec. 1065)[4] are silent on the subject, but at 119 M.C.C. 552, 553, the Commission held:

> "In addition to all other considerations, where one existing interstate motor common carrier seeks to extend its irregular route operating authority through the purchase of other existing irregular-route rights, and the possibility of tacking is involved (which, in effect, creates a gateway through which the acquiring carrier would be required to operate in order to maintain the integrity of the two separate certificates), the applicant carriers shall also be required to give notice in the application with respect to such tacking possibilities *and to prove that the present or future public convenience require that those authorities be tacked or joined. If this additional showing cannot be made at the time the purchase is approved, then a 'no-tacking' restriction will be placed on the approval.*

[4] The validity of the regulations was sustained in *Thompson Van Lines* v. *U.S.*, 399 F.Supp. 1131 (3-judge court, D.D.C.1975), aff'd. *per curiam*, —— U.S. ——, 46 L.Ed.2d 630. The position of petitioners herein is in no way inconsistent with *Thompson*.



> If a need to tack can be shown at that time, sufficient to warrant tacking of the two authorities, then this Commission will grant the operating authority directly between the points that could be served by the tacking of those operating rights." (Emphasis supplied.)

Petitioner on September 24, 1974, petitioned the Commission to modify its report so that the gateway elimination regulations would have no applicability to transactions governed by Secs. 5(2) and 212(b) of the act. It based its request on a number of reasons including the two grounds embraced in this petition. Its petition was denied by order served December 5, 1974 (App. C, p. 9a). One day earlier, on December 4, 1974, the Commission issued a statement entitled "Policy Statement Concerning Ex Parte No. 55 (Sub-No. 8) and Applications Under Secs. 5(2) and 212(b) of the Interstate Commerce Act." (App. C, p. 10a). This Policy Statement spelled out in greater detail the substantive decision of the Commission to make the gateway regulations applicable to acquisition and transfer transactions and required parties to such transactions to file a separate and additional application under Sec. 207 and prove that public convenience and necessity required the unified operations. Commissioner Clapp vigorously dissented (App. C, p. 12a) to the application of the regulations to Secs. 5 and 212 (b) transactions; he took issue with the interpretation of such authority by means of a Policy Statement insisting that the actions required amendment of Sec. 5 to change the statutory standard of "consistent with the public interest," as well as the requirement of notice in the Federal Register for the effective amendment of the transfer regulations.

On February 5, 1975, petitioner again sought reconsideration urging that the gateway regulations not be made applicable to acquisitions. By order served April 1, 1975, the Commission, Commissioner Clapp again dissenting, denied petitioners' request for reconsideration. (App. C, p. 13a).

Court review followed.

## REASONS FOR GRANTING THE WRIT

1. This case presents a novel and important question of Federal law which has not been but should be decided by this Court. The issue was resolved by the court below incompatibly with settled principles of appellate review as well as the time honored prohibition against the substitution of judicial for legislative judgment in statutory construction and hence, warrants immediate consideration by this Court. The decision of the court below sustaining the Commission's orders represents a conflict with applicable decisions of this Court and reflects such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The net effect of the orders complained of substantially inhibits the expansion of small carriers and significantly lessens the value of irregular route certificates because of the added burden on their marketability.

Transactions under Sec. 5 of the act have been the subject of review by this Court on many occasions. For example, in *McLean Trucking Company* v. *U.S.*, 321 U.S. 67, 74-76 (1944), this Court observed, as pertinent here, that the Commission is empowered to authorize and approve a consolidation either as applied for or as



qualified by such terms and conditions as it deems just and reasonable if it finds that the merger "will be consistent with the public interest" within the meaning of Section 5(2)(b). It recognized the express statutory criteria which govern the Commission's actions in Sec. 5 transactions and that those provisions of Sec. 5:

> "supply the general statutory standards for guiding the Commission's judgment; and within their broad limits, its authority is 'exclusive and plenary'", citing Sec. 5(11).

Sec. 5(11) of the act expressly provides that the provisions of that section are "exclusive and plenary". It further provides that a carrier obtaining approval by the Commission thereunder shall have full power to carry such transaction into effect and to *own* and *operate* any properties and exercise any control acquired through such transaction.

Both the courts and the Commission have long recognized the distinct difference between the public convenience and necessity standard of Sec. 207 of the act and the public interest standard of Sec. 5. In *Baggett Transp. Co.—Purchase—Bishop*, 36 M.C.C. 659, 663-664 (1941), the Commission itself observed that public convenience and necessity ordinarily requires a higher degree of proof than mere consistency with the public interest and usually contemplates an entirely distinct set of circumstances. To be consistent with the public interest a transaction need only not be inimicable to that interest. Improvement is not demanded; only an absence of detriment. As Commissioner Clapp pointed out in his dissent to the order served April 1, 1975 (App. C, p. 17a), any doubt of this evidentiary distinction was laid to rest in *Ratner* v. *U.S.* (D.C.Ill.

1957), 162 F.Supp. 518, 519 aff'd. *per curiam sub nom* 356 U.S. 368 (1968). There, the court noted error of the Commission in finding that the purchase transaction under Sec. 5 of the act not only had to be consistent with the public interest but also had to be responsive to a public need.

The notion that the Commission had the power to superimpose the public convenience and necessity criterion in a Sec. 5 transaction, as it has done in these proceedings, was expressly rejected by the Commission itself as long ago as 1936 in *Keeshin Motor Express Co., Inc. (Illinois)—Leases,* 1 M.C.C. 373, 380, 381, where it overruled the contention that in addition to procuring approval of an application to acquire operating rights, an applicant should also obtain, upon "proof of public convenience and necessity, specific authority to conduct unified operations." It expressly ruled that it would be inconsistent to conclude that such through service may not be rendered without special proof of public convenience and necessity after any such carriers are "merged or otherwise unified." Yet, the superimposition of the public convenience and necessity standard in Sec. 5 transactions as related to irregular route carriers is precisely what the Commission has accomplished here.

For the first time, the Commission articulated its position before the court below that joinder of operating rights acquired really represented a "two step" transaction. The Commission contended that under its application of the elimination of gateway regulations to irregular route acquisitions, the carriers in obtaining approval of the acquisition would be bound by Sec. 5 standards only. It was not until the acquiring carrier proposed to conduct unified operations that it urged



that the public convenience and necessity standard would be applied. The court of appeals was obviously led into error for it found (1) that the acquisition of tacking rights is a "policy" of the Commission rather than an absolute right of the transferee and (2) that Sec. 208(a) gives the Commission not only the general power to attach conditions to acquired certificates but also considerable discretion and latitude in the fashioning of conditions considered germane. It further erroneously found that:

> "However, Section 5 is not a guarantee that tacking would be allowed where there has been no satisfaction of the higher standard of public convenience and necessity."

Both the contention of the Commission and the finding of the court below are in express conflict with the statute. The statutory language leaves no doubt on this score.[8]

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[8] Sec. 5(2)(a) makes lawful a consolidation or merger of the properties or franchises of two or more carriers, or any part thereof, into one corporation "for the *ownership, management, and operation* of the properties theretofore in separate ownership." It also provides that any carrier, or two or more carriers jointly, may "purchase, lease or contract to *operate* the properties, or any part thereof, of another." Likewise, Sec. 5(11) provides that "any carrier or corporation participating in or resulting from any transaction approved by the Commission [under Sec. 5] shall have full power . . . to carry such transaction into effect and to *own and operate* any properties and *exercise any control* or franchises acquired through said transaction . . ." Sec. 5(11) also exempts such carriers and their officers from the "antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to *carry into effect* the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to *hold, maintain, and operate* any properties and exercise any control or franchises acquired through such transaction." (Emphasis supplied.)

Section 5(11) provides that the authority conferred by that section shall be "exclusive and plenary." Sec. 5(11) was included by 1940 amendments and the legislative history of those amendments shows that "these provisions were designed to facilitate consolidation of carriers."[6]

When Congress used the words: "to own and operate any properties and exercise any control or franchises acquired through said transaction" and the words "exclusive and plenary," it meant that Sec. 5 and Sec. 5 alone was the *only* statutory provision governing the Commission's jurisdiction in deciding motor carrier acquisition cases. In this analysis, once approval is given to a proposed transaction as being consistent with the public interest, ownership, operation of properties, and control of franchises include the *unified* operations of the acquiring carrier with those thus acquired. To impose the added burden of public convenience and necessity in an acquisition case as the Commission has done in order to permit unified operations, simply does not square with the stated Congressional intent of "facilitating consolidations" of carriers nor with the language of the statute. Thus, approval or disapproval of joinder or tacking of operating rights acquired in a Sec. 5 transaction must be governed only by the consistency with the public interest standard.

It is true that Sec. 208(a) gives the Commission general power to attach conditions to certificates, but that power is by the terms of the act itself limited to "any certificate issued under Sec. 206 and 207" of the act (49 U.S.C. Sec. 308(a)). Sec. 208(a) does not

[6] House Report 2016 on S.2009 (54 Stat. 908), 76th Cong., p. 61.



give the Commission power to attach conditions to acquired certificates as found by the court of appeals (App. A, pp. 4a-5a), for the Commission's power to impose terms, conditions and modifications in an acquisition case is found in Sec. 5(b). The regulatory power to impose terms, conditions and modifications in such proceedings is further conditioned upon the finding that the proposed transaction "will be consistent with the public interest." In short, the sole governing standard for the imposition of conditions and restrictions, such as a no-tacking restriction in an acquisition proceeding, is, by the terms of Sec. 5, "consistency with the public interest." Therefore, petitioners do not contend, as suggested by the court below, that Sec. 5 is a "guarantee" that tacking would be allowed. They insist, however, that if a tacking prohibition is to be imposed in a Sec. 5 transaction, the prohibition must be justified on the basis of inconsistency with the public interest and not because the applicants failed to satisfy "the higher standard of public convenience and necessity." The Commission's requirement that an acquiring carrier establish public convenience and necessity for the unified operations is totally contrary to Congressional intent as expressed in Sec. 5 of the act.

Congress in enacting Sec. 212(b) specifically intended to provide a means whereby small carriers could effectuate their transfers easily and without great delay and could "get together without the necessity of going through a great deal of red tape with the Commission."[7] In such transactions, no hearing is required and approval or disapproval depends solely upon con-

[7] 79 Cong. Rec. 5655.

formance or nonconformance with the transfer regulations. *Wooten—Purchase (Portion)—Columbia Truck Exp.*, 49 M.C.C. 486, 591 (1949). Yet, the imposition of a public convenience and necessity standard on simple transfer applications where unified operations are proposed, converts an expedited and inexpensive proceeding to one which imposes an awesome burden of proving that public convenience and necessity requires the proposed through service.

As this Court, after noting the Commission's expertise in the field of transportation, succinctly observed in *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U.S. 49, 54 (1965), "[b]ut Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits."[8]

The direct result of the orders and Policy Statement complained of is that, contrary to the Congressional mandate, acquiring irregular route carriers in *all* irregular route acquisitions which would result in joinder of existing authority with that acquired must, in connection with an acquisition application under Sec. 5 or a transfer application under Sec. 212(b), also file a Sec. 207 application and prove that the public convenience and necessity requires the through service regardless of whether any "new" service is involved. This proof is mandatory regardless of whether any question of "dormancy" is involved, regardless of whether *any* circuity is involved in the joinder, and regardless of whether a single drop of fuel would be saved through the unified operation. The Commission's actions are therefore in excess of statutory power and are arbitrary and capricious.

[8] See also *Atchison Topeka Santa Fe Railroad* v. *Wichita Board of Trade*, 412 U.S. 800, 806-807 (1973).



2. Congress has long ago determined that in rulemaking proceedings, "either the terms or substance of the proposed rule or a description of the subjects or issues involved" must be published in the Federal Register "which is the statutory and accepted means of giving notice of a rule as adopted."[9] Yet no notice was ever given in the Federal Register of the Commission's intention of making its gateway elimination regulations applicable to acquisition and transfer proceedings. The government argues, and the court below was persuaded, that the industry was generally on notice that the Commission was proposing a revision of its policies on gateway issues and on tacking of certificates. The government contends that since notice was given in the Federal Register of the Commission's general intention in this area, it was not necessary to spell out in the notice that the rules were to be made applicable to acquisitions and transfers. Indeed, the Commission in its order served April 1, 1975, (App. C, p. 15a), expressly held that:

> "inasmuch as the rules and regulations adopted for gateway elimination did not alter the statutory standard to be employed in Secs. 5 and 212(b) proceedings, notice of amendment to the acquisition and transfer regulations would not be required."

In fact and in law, the orders complained of in this rulemaking proceeding accomplished the following:

1. Reversed the Commission's long standing substantive principle of law as announced in *Keeshin, supra,* and followed by carriers since 1936 that public convenience and necessity need not

[9] Sec. 554(b)(3), APA (5 U.S.C. 553); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969).

be proved for unified operations in an acquisition proceeding;[10]

2. Amended the Commission's substantive regulations pertaining to consolidations, mergers, purchases or leases (49 C.F.R. 1134);

3. Amended the Commission's substantive transfer regulations (49 C.F.R. 1132);[11]

4. Imposed a public convenience and necessity requirement of Sec. 207 in Sec. 5 transactions notwithstanding the Congressional mandate that the provisions of Sec. 5 are "exclusive and plenary;" and

5. Imposed a public convenience and necessity requirement in Sec. 212(b) transfer proceedings, thus converting a simple, no hearing, expedited procedure, designed to permit small carriers to get together inexpensively and without a great deal of red tape with the Commission into one including a totally different and greater burden and expense.

Petitioners submit that these consequences of the orders complained of are not mere tangential results of the general notice published in the Federal Register which should have been anticipated, but are in and of themselves of more than sufficient moment to require notice by publication under APA. The observance of

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[10] Government counsel argues that this change is merely one of policy which the Commission is free to change as a matter of discretion, yet in 1936, the Commission itself in *Keeshin, supra,* expressly held as a matter of law that the superimposition of a public convenience and necessity standard in a Sec. 5 transaction would be inconsistent with other provisions of the act. *Supra,* p. 10.

[11] See Commission Clapp's dissent in both the Policy Statement served December 4, 1974, and Commission order served April 1, 1975 (App. C, pp. 12a, 16a, 18a).



the court below that the attention of the Commission "was focused on the matter is clear enough from analysis of Commissioner Clapp's dissent as well as from the discussion in the Commission's opinion" begs the question. The purpose of the notice requirements in advance of formulation of regulations is to afford interested and affected parties an opportunity to provide input toward that formulation *prior* to the promulgation of the regulations in question, not after. Here, the Commission's failure to give Federal Register notice of its intention effectively deprived thousands of irregular route motor carriers from participating in a rulemaking proceeding the result of which would directly and substantially adversely affect their future growth and expansion and substantially lessen the value of operating rights. Departure from notice requirements of APA in these proceedings is of such significance and broad application as to require the exercise of this Court's power of supervision.

3. The court below misconceived the impact of the Commission's action when it observed (App. A, p. 5a):

> "There is at least some reason to hope that at this relatively late moment of time, a large part of the paperwork burdens that resulted from the order may belong more to the past than to the future."

While there was a flurry of "paperwork" in response to the regulations by carriers seeking to continue joining or tacking their individually held certificates, the application of the elimination of gateway regulations to acquisitions has not been made on an interim basis but continues into the future. The unlawful imposition of the public convenience and necessity standard under the orders must be met in *all future* applications under

both Sec. 5(2) and 212(b).[12] The exercise of this Court's power of supervision is therefore required to bring about an end to what petitioners consider a classic example of regulatory agency action beyond express and limited statutory power.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[12] Policy Statement served December 4, 1974 (App. C, p. 10a).

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1510

COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, A CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS

STEEL CARRIERS CONFERENCE OF A.T.A., WATKINS MOTOR LINES, INC., ACE DORAN HAULING & RIGGING CO., ET AL, PRE-FAB TRANSIT CO., COLONIAL REFRIGERATED TRANSPORTATION INC., ANDERSON TRUCKING SERVICE, INC.

Petition for Review of an Order of the Interstate Commerce Commission

Argued March 31, 1976

Decided April 23, 1976

*Edward G. Villalon,* with whom *James E. Wilson* and *Jon F. Hollengreen,* were on the brief for petitioner and intervenor Steel Carriers Conference of A.T.A. *Chandler L. van Orman* was on the brief for intervenor, Pre-Fab Transit Co.

*Paul M. Daniell,* of the bar of the Supreme Court of the United States, *pro hac vice* by special leave of court, with whom *Edward G. Villalon,* was on the brief for intervenors, Watkins Motor Lines, Inc., et al.

*John P. McMahon* and *A. Charles Tell,* were on the brief for intervenors. Ace Doran Hauling & Rigging Co., et al.

*E. Stephen Heisley,* was on the brief for intervenor, Colonial Refrigerated Transportation, Inc.

*Edward G. Villalon,* signed a brief for intervenors Anderson Trucking Service, Inc., et al.

Before: BAZELON, *Chief Judge,* LEVENTHAL, *Circuit Judge* and A. SHERMAN CHRISTENSEN,* *United States Senior District Judge* for the District of Utah

*Per Curiam:* The issues in this case are well known to the industry, and are reasonably identified in the opinions (including the dissenting opinion) of the Interstate Commerce Commission on reconsideration. We therefore propose no extended statement of the facts and issue. At issue are the Commission's Gateway Elimination Regulations challenged as being in excess of the Commission's statutory authority and as being promulgated without adequate notice. These regulations govern the "gateway" problems experienced by irregular-route motor common carriers, and seek to eliminate circuitous operations resulting from the carriers combining or "tacking" two separate grants of route authority at a service point common to each.[1] In *Thompson Van Lines v. United States,*[2] a three-judge district court held that the elimination of gateways by rulemaking was an appropriate exercise of the ICC's rulemaking authority. This case challenges the appropriateness of applying the Gateway Elimination Rules to transfers and acquisitions of irregu-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The regulations and order were issued in *Motor Common Carriers of Property Routes and Service,* Ex Parte No. 55, Feb. 25, 1974. They are codified at 49 C.F.R. 1065 (1975).

[2] 399 F.Supp. 1131 (3-judge court, D.D.C. 1975), *aff'd per curiam,* —— U.S. ——, 96 S. Ct. 763 (1976).



lar route certificates. The Commission specifically addressed and rejected petitioners' argument.[3]

I.

In brief, we affirm the regulations and order, and deny the petitions for review of the following reasons.

In the particular circumstances of this case, we do not think we can say that the aspect of the order presently before us must be vacated because of lack of adequate notice. The industry was generally on notice that the ICC was proposing a large scale revision of its policies on gateway issues and on tacking of certificates. Section 533 of the APA does not require every aspect of the proposed order to be explained in the general notice.[4] Even where there is a technical flaw in the notice, it can be overcome if the actual conduct of the proceeding provides notice to the participants of what is under contemplation. *See, e.g., Texaco v. FPC,* —— F.2d —— (Nos. DC-35, DC-36, and DC-37, TECA 1976). Here, the reference in the docket which accompanied the formal notice of rulemaking would indicate, albeit in a footnote, that in the Commission's mind a corollary of its proposed new gateway approach would be its application to future transfers of operating rights and certificates. That footnote did prompt presentations on behalf of some irregular carriers making the kind of points raised by petitioners before us. These points were presented to the ICC prior to issuance of the gateway regulations. The same points were of course raised after issuance of the gateway regulations on petitions for reconsideration. That the attention of the Commission was focused on the matter

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[3] *See* Order Denying Petition for Reconsideration, Ex Parte No. 55, April 1, 1975.

[4] Buckeye Cablevision, Inc. v. FCC, 128 U.S.App.D.C. 262, 268, 387, F.2d 220, 226 and n.26 (1967); 5 U.S.C. § 553(b)(3) (1970).

is clear enough from the analysis in Commissioner Clapp's dissent as well as from the discussion in the Commission's opinion.

Finally, the substantive issues at stake here are in a sense procedural, relating to burden of proof. While the importance of such procedural issues cannot be gainsaid, we need not have the same requirement for, say, a second round of notice and comment, as has emerged for agencies dealing with areas where scientific facts are involved and notice must be given with more particularity so that the issues can be fairly drawn and comment fairly presented. *Cf.* Pederson, "Formal Records and Informal Rulemaking" 85 YALE L. J. 38 (1975).

II.

On the legal issues in the case, while the discussion of the ICC is compressed, we think it is adequate, especially when taken in combination with the discussion of the court in *Thompson, supra.*

Briefly the matter stands that in accordance with the spirit of Section 5[5] one carrier can acquire the rights of another merely by showing satisfaction of the public interest standard (*e.g.*, on a showing of lack of dormancy.) However, Section 5 is not a guarantee that tacking would be allowed where there has been no satisfaction of the higher standard of public convenience and necessity. We are fully aware that in economic and managerial terms it is the prospect of tacking that inspires the bulk of applications under § 5 for transfer. Nevertheless, as the *Thompson* opinion shows, the acquisition of tacking rights is a policy of the Commission rather than an absolute right of the transferee. Section 208(a),[6] giving the Commission general power to attach conditions to the transfer

[5] Interstate Commerce Act, 49 U.S.C. § 5 (1970).

[6] 49 U.S.C. § 308(a) (1970).



certificates, gives the ICC considerable discretion and latitude in the fashioning of conditions considered germane to the provisions of the Act and to its regulatory programs.

Even with the regulations under challenge, the ICC does contemplate that tacking rights will be provided, either through the connecting point or by a direct route that bypasses the connecting point and avoids circuity. The requirement of a showing of public convenience and necessity, at least where because of tacking the application initiates what amounts to a new service for the carrier involved, is not contrary to the scheme of the Act, in our view, and we have no basis in the record before us for concluding either that this is unreasonable on its face or that it will be unreasonably applied. Carrier freedom is not as complete as it was prior to the order before us, and doubtless there will be some instances of what will prove to be unnecessary burdens and perhaps unsound action. On the other hand, this is not an unreasonable price to pay to gain the advantage of the regulations, taken in the large, of fuel savings and other benefits from avoidance of circuity. There is at least some reason to hope that at this relatively late moment of time, a large part of the paperwork burdens that resulted from the order may belong more to the past than the future. In any event, the reviewing court must restrain itself from intervention in the absence of a convincing showing of unreasonableness.

We have considered and rejected other arguments made by petitioners.

*Affirmed.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1975

No. 75-1510

COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, A CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS

STEEL CARRIERS CONFERENCE OF A.T.A., WATKINS MOTOR LINES, INC., ET AL., ACE DORAN HAULING & RIGGING CO., ET AL., PRE-FAB TRANSIT CO., ETC., COLONIAL REFRIGERATED TRANSPORTATION INC., ANDERSON TRUCKING SERVICE, INC., INTERVENORS

[Filed May 17, 1976]

Before: Bazelon, Chief Judge; Leventhal, Circuit Judge and Christensen*, U.S. Senior District Judge for the District of Utah.

### Order

On consideration of the petition for rehearing filed by petitioner Common Carrier Conference, etc. and intervenor Steel Carriers Conference of A.T.A., it is

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).



ORDERED by the Court that the aforesaid petition for rehearing is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1975

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[Filed May 17, 1976]

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

**Order**

The suggestion for rehearing *en banc* filed by petitioner Common Carrier Conference, etc. and intervenor Steel Carriers Conference of A.T.A., having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk



**APPENDIX C**

[Service Date Dec. 5, 1974]

**Order**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 3rd day of December, 1974.

EX PARTE No. 55 (Sub-No. 8)

MOTOR COMMON CARRIERS OF PROPERTY, ROUTES AND SERVICES (Petition for the Elimination of Gateways by Rulemaking)

Upon consideration of the record in the above-entitled proceeding, and of the petition of Common Carrier Conference—Irregular Route, filed September 24, 1974, for rule modification;

*It is ordered,* That the petition be, and it is hereby denied, for the reasons (a) that the findings of the Commission in *Gateway Elimination,* 119 M.C.C. 530, were in accordance with the evidence and the applicable law, and (b) that no sufficient or proper cause has been demonstrated to warrant modification of the Gateway Elimination Rules (49 CFR 1065) as they pertain to proceedings pursuant to Section 5 or Section 212(b) of the Interstate Commerce Act.

By the Commission.

JOSEPH M. HARRINGTON,
Acting Secretary.

(SEAL)

[Service Date Dec. 4, 1974]

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

# POLICY STATEMENT CONCERNING EX PARTE NO. 55 (SUB-NO. 8) AND APPLICATIONS UNDER SECTIONS 5(2) AND 212(b) OF THE INTERSTATE COMMERCE ACT

December 3, 1974

The Commission today adopted the following procedures for handling applications under sections 5(2) and 212(b) of the Interstate Commerce Act where the joinder of separate irregular route rights are proposed and the provisions of Ex Parte No. 55 (Sub-No. 8), *Gateway Eliminations,* 109 M.C.C. 530, are pertinent.

On applications under sections 5(2) and 212(b) where a joinder of unrestricted separate segments of irregular route authority is involved and which applications were filed prior to November 23, 1973, and decided and consummated as of November 23, 1973, or filed prior to November 23, 1973, but consummated after such date and in which a certificate is awaiting issue, the parties will have 60 days from issuance of this notice to file a letter-notice or an OP-OR-9 application pursuant to the Gateway Elimination Rules (49 CFR 1065) to eliminate any gateways created by the unification of the separate irregular route authorities. Failure to file such request within the time period will result in imposition of a prohibition against tacking. On applications filed prior to November 23, 1973, but which for various reasons have not been consummated, the parties also will have 60 days from date of this notice to file a letter of intent to eliminate any resulting gateways. If the evidence presently of record is adequate tacking of the separate irregular route authorities involved could be authorized and the gateways



may be eliminated within 60 days of consummation of the transaction pursuant to the gateway rules.

On applications under section 5(2) filed after November 23, 1973, and which are (1) decided and consummated but no certificate has been issued, (2) decided and not consummated, or (3) not finally determined, the carriers are given 60 days from the date of this notice to supplement the existing record to support tacking of the separate authorities. During the same 60 days, an OP-OR-9 application is to be filed for elimination of the resulting gateway and such will be handled as a directly related matter to the section 5 proceedings.

In all future applications under section 5(2) the parties will be required to submit the requisite proof with the application under section 5(2) to justify tacking of the separate irregular route rights and to file a directly related OP-OR-9 application for the elimination of the gateway and performance of direct through operations. Generally, the criteria in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421 and *Maryland Transp. Co. Ext.—Specified Commodities,* 83 M.C.C. 451, will be applicable to such gateway eliminations, giving consideration, of course, to the fact that irregular route rights under separate ownerships are involved. In section 5(2) proceedings questions of tacking will be handled in the section 5(2) proceeding and where gateway eliminations are sought, they will be handled as a matter directly related to the proposed unification. Failure to seek and justify gateway elimination in any of the above-described situations will result in the imposition of a "no tacking" restriction. In section 212(b) proceedings involving a proposed unification of irregular routes where tacking is proposed, applicants will be permitted to supplement the applications and present proof at the time of filing which would justify tacking of the involved authorities. Such tacking will be granted if warranted. Concurrently with the filing of the

transfer application the purchasing carrier will be required to file an OP-OR-9 application for elimination of the resulting gateway.

COMMISSIONER CLAPP, dissenting:

I share the views of my colleagues that our administration of the Act must be fully responsive to the demands created by the energy crisis. I favor the application of the regulations to proceedings subject to section 207 as provided for in the Commission's report of February 15, 1974. However, I am constrained to disagree with the application of those regulations to proceedings under sections 5 and 212(b) and the interpretation of such authority by means of a Policy Statement. The requirement of a showing of public convenience and necessity for more direct authority in circumstances where a unification would justify the tacking of rights which would result in operations exceeding 20 percent in circuity, in my view, requires amendment of section 5 to change the statutory standard of "consistent with the public interest." It further requires complete notice to parties of the amendment of the Transfer Regulations so that their views can be considered should they so desire. This has not been provided in this instance. For these reasons I have favored reopening of the proceeding in Ex Parte No. 55 (Sub-No. 8) to consider further the application of the regulations to sections 5 and 212(b).



[Service Date Apr. 1, 1975]

**Order**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of March, 1975.

EX PARTE No. 55 (Sub-No. 8)

MOTOR COMMON CARRIERS OF PROPERTY, ROUTES AND SERVICES
(Petition for the Elimination of Gateways by Rulemaking)

Upon consideration of the record in the above-entitled proceeding, and of petition of Common Carrier Conference —Irregular Route, filed February 5, 1975, for reconsideration; and

*It appearing,* That petitioner poses certain hypothetical questions and technical problems in its brief which may not properly be addressed on petition for reconsideration but should be directed to this Commission by informal communication for an appropriate response; that, however, petitioner raises certain substantive issues which were addressed in this Commission's policy statement of December 3, 1974, and in the report of the Commission at 119 M.C.C. 530, which record was considered in the instant order and in the order served December 5, 1974, and which issues will be restated herein for elaboration, clarification, and as reasons for this Commission's action;

*It further appearing,* That Petitioner contends (1) that the rules and regulations promulgated for gateway elimination effectively amended certain statutory provisions of the Interstate Commerce Act relating to Section 5 and 212(b) proceedings, and such provisions were amended without proper notice to the public, specifically arguing that the statutory standard of "consistent with the public interest" employed in Section 5 proceedings has been altered by adoption of the *Gateway* rules requiring appli-

cants to prove that the public convenience and necessity require that acquired authority be tacked with other irregular route authority; (2) that imposition of "no-tacking" restrictions upon failure to prove that the public convenience and necessity require joinder encumber certificates and deprive carriers of property without due process of law; (3) that the adopted rules will discourage acquisitions which otherwise would be in the public interest and will force carriers toward control proceedings; and (4) that the adopted rules are discriminatory and unclear;

*It further appearing,* That considering petitioner's arguments seriatim, (1) that in applying the relevant statutory criteria, Section 5(2)(c)(2) of the Act requires consideration of the effect of the proposed transaction upon adequate transportation service to the public; that operating economies have long been a factor meriting consideration, and that questions of public convenience and necessity have been found to be properly considered within the scope of Section 5 proceedings (See *Brooks Transp. Co., Inc., — Purchase—Jacobs Transfer Co.,* 5 M.C.C. 85, 87, and *Hayes Freight Lines, Inc.—Purchase—Whitney,* 38 M.C.C. 375, 380); that it is, therefore, appropriate for this Commission to consider that the operating rights acquired cannot be utilized in conjunction with rights presently held unless the gateway resulting from joinder can be eliminated upon proof of public convenience and necessity as required by the *Gateway* regulations, and that requiring such proof in the pertinent Section 5 proceedings is consistent with the statutory standard employed therein inasmuch as utilization of the operating rights so acquired is a relevant consideration; that the transfer rules (49 CFR 1132) promulgated for transfers under 212(b) of the Act require that the prospective transferee show that it is fit, willing, and able to perform the authorized service in conformity with the provisions of the Act and the regulations of the Commission; that in order to comply with the regulations pro-



mulgated for gateway elimination (49 CFR 1065), a transferee must prove that the public convenience and necessity require the proposed through service on operations involving circuities of greater than 20 percent; that it is, therefore, appropriate for this Commission to determine in the pertinent Section 212(b) proceeding if the transferee is able to comply with the *Gateway* regulations upon a showing that the public convenience and necessity require that the involved authorities be joined; that inasmuch as the rules and regulations adopted for gateway elimination did not alter the statutory standards to be employed in Sections (5) and 212(b) proceedings, notice of amendment to the acquisition and transfer regulations would not be required; (2) that full due process procedures were observed in the *Gateway* case and are required to be observed in ensuing acquisition and transfer proceedings (see *Gateway Elimination,* 119 M.C.C. 530, 533, 552); that this Commission is not encumbering certificates by requiring applicant carriers to prove that the public convenience and necessity require joinder; that rather this Commission, pursuant to its regulatory overview power, is requiring carriers to adapt their operations to promote a more economical and efficient service consistent with the national transportation policy and current environmental standards (See *Gateway Elimination, supra,* at 547); that "no-tacking" restrictions will not be imposed automatically in acquisition proceedings, but only after applicant carriers have been given a full hearing and failed to meet the requisite standard of proof; (3) that the contested rules do not favor control situations since the Commission in appropriate circumstances can disregard separate corporate entities and impose "no-tacking" restrictions on control applications as well as those involving formal acquisitions; (4) that nature of regular-route operations necessarily involving movements over certain fixed routes and observance of specific schedules precludes the applicability of the Gateway Elimi-

nation Rules to regular-route carriers (see *Gateway Elimination, supra,* at 547 and 548), and that inasmuch as gateway elimination is only effective and necessary when applied to irregular-route operations, the rules, regulations and procedures regarding gateway elimination are not applied discriminatorily but limited to the scope of their effectiveness and necessity;

*It further appearing,* That petitioner's arguments are neither legally nor practically persuasive when weighed against the necessity of eliminating all gateways and maintaining consistency in Commission proceedings; and good cause appearing therefor:

*It is ordered,* That the petition be, and it is hereby, denied, (a) for the reasons enumerated above, no sufficient or proper cause has been demonstrated to warrant modification of the Gateway Elimination Rules (49 CFR 1065) as they pertain to proceedings pursuant to Section 5 or Section 212(b) of the Interstate Commerce Act, and (b) for the reason that the findings of the Commission in *Gateway Elimination,* 119 M.C.C. 530, and in the order served December 5, 1974, are in accordance with the evidence and applicable law.

By the Commission.

COMMISSIONER CLAPP, dissenting:

Today's order purports to reconcile the gateway regulations with Sections 5 and 212(b) of the Act by advising us that operating economies and matters of public convenience and necessity have been considerations of longstanding in Section 5 proceedings, and that transfers must comply with all Commission regulations, ergo transfers must comply with the gateway regulations.

Consideration of public convenience and necessity in Section 5 proceedings has been accorded those matters which are *directly related* to the unification proceedings.



Directly related matters as noted in the *Hayes* case cited in this order, involve such things as the removal of a restriction in the rights sought to be acquired in order that the proposed coordination could be better achieved, but do not embrace requests for new or substantially greater authority than that sought to be acquired. Some cases decided in the early days of regulation were concerned with the acquisition of second proviso rights for which proof of public convenience and necessity had not been demonstrated, and similar situations were present when Section 206(a) was amended during the last decade. In these contexts, consideration of public convenience and necessity in Section 5 proceedings was wholly appropriate.

In the normal situation, however, one of the first cases to construe the Motor Carrier Act of 1940 and the reference in Section 5 to "consistent with the public interest" found that it was not synonymous with the standard for issuing new operating authority of "public convenience and necessity", that pc&n ordinarily required a higher degree of proof than mere consistency with the public interest, and that pc&n usually contemplated an entirely distinct set of circumstances. *Baggett Transp. Co.—Purchase —Bishop,* 36 M.C.C. 659, 663-664 (1941). Any doubt of this evidentiary distinction was laid to rest in *Ratner* v. *United States,* 162 Fed. Supp. 518, 519 (S.D. III. 1957), aff'd per curiam sub. nom. at 356 U.S. 368 (1968). In sustaining our approval of a unification, the court noted error in the finding that the purchase not only had to be consistent with the public interest but also had to be responsive to a public need.

Only where operating rights sought to be acquired are dormant or their acquisition would result in a wholly new or radically different service has a Section 5 applicant been required to demonstrate proof of public need similar to that required under Section 207. As the court noted in *C & H Transportation Company* v. *United States,* 249 Fed. Supp.

97, 100 (N.D. Tex. 1965), "Logically, the Commission then requires the same degree of proof as it would in an application for new routes."

The gateway regulations would materially alter a Section 5 applicant's statutory burden of proof by requiring proof of public convenience and necessity (1) to avoid the imposition of a restriction against tacking the unified rights with those of the acquiring carrier in situations where rights are not dormant and where approval would result in a substituted service rather than a new service, and (2) to obtain more direct authority where approval would result in operational circuity of more than 20 percent, although substantial operational circuity, standing alone, does not bar a finding that the transaction is consistent with the public interest. *Shamrock Van Lines, Inc.—Purchase—Reely,* 93 M.C.C. 445, 461. As to the latter, the prior report, 119 M.C.C. at 541, does not appear to forestall a recipient of direct authority from continuing to operate circuitously. This curious inconsistency is referred to in today's order as a hypothetical question and a technical problem.

Section 5 requires the Commission's prior approval for the acquisition of control of two or more carriers regardless of the form by which such control is achieved. The gateway regulations, however, apply only to those acquisitions where rights merge in the acquiring carrier, and exempt from their application those acquisitions which result in common control. Common control for substantial periods has been discouraged since it is contrary to the Commission's policy of corporate simplification and has the potential for discrimination. The gateway regulation exemption for common control situations, as noted by petitioner, will encourage the filing of control applications and for this additional reason, warrants further consideration.

The displacement of statutory standards is compounded by application of the gateway regulations to transfer pro-



ceedings. As we have seen, pc&n is not synonymous with and contemplates a more stringent burden of proof than "consistent with the public interest." Section 212(b) and the Transfer Regulations require the Commission's prior approval of those unifications which are too small to qualify under Section 5. Approval under Section 212(b) is not contingent upon proof that the transfer is "consistent with the public interest" *Stearn—Purchase—Hartman,* 47 M.C.C. 285, and *Aaacon Auto Transport, Inc.* v. *United States,* 345 Fed. Supp. 101, 107-108 (S.D. N.Y. 1972) wherein the court observed that Congress evidently believed that a transfer of operating rights was generally not a matter of serious concern. Yet the gateway regulations require proof of public convenience and necessity to preclude the imposition of a tacking restriction on the transferred rights and to support the issuance of more direct authority where approval would result in operational circuitry of more than 20 percent.

It should be obvious that a showing of pc&n in Section 5 and 212(b) proceedings subsumes the traditional lesser proof requirements and public policies underlying those provisions and, therefore, has improperly amended the statutory standards of the Act. Considerations that are germane to the issuance of new or additional operating authority under Section 207 are not and should not be dispositive of the issuance of operating authority emanating from approval under Section 5 and 212(b).

Commissioner Corber did not participate in the disposition of this proceeding.

ROBERT L. OSWALD,
Secretary.

(SEAL)

## APPENDIX D

### Sec. 5(2)(a)-(c) Interstate Commerce Act (49 U.S.C. Sec. 5)

SEC. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, August 2, 1949, and July 27, 1965.*] [*49 U.S.C. § 5.*]

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the



Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to deterine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include,

other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

**Section 5(11) Interstate Commerce Act**
**(49 U.S.C. Sec. 5(11))**

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly,



of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

**Sec. 207 Interstate Commerce Act**
**(49 U.S.C. Sec. 307)**

S53. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

**Sec. 212(b) Interstate Commerce Act**
**(49 U.S.C. Sec. 312)**

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. [*August 9, 1935, amended June 29, 1938. September 18, 1940, August 22, 1957, October 15, 1966.*] [*49 U.S.C. § 312.*]

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

**Sec. 553 Administrative Procedure Act**
**(5 U.S.C. Sec. 553)**

SEC. 553. RULE MAKING [*5 U. S. C. § 553.*]

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or



(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.